



the Motion to Vacate. In fact, the State of Oklahoma requested additional time from the Court in order to fully respond to the comments and objections. The comments and response will be before this Court along with the Partial Consent Decree for this Court's consideration. This meets any process requirements under CERCLA and it provides ample opportunity for the State and this Court to give fair and adequate consideration to the objections and comments of the Non-Settling Defendants.

It is irrelevant that the Partial Consent Decree was not published in the Federal Register. The Partial Consent Decree is not a settlement under CERCLA Section 122(h), which is limited on its face to settlements for "costs incurred by the United States Government." 42 U.S.C. § 9622(h). No such costs are at issue in this case or settled by the Partial Consent Decree. Further, the Non-Settling Defendants' argument that this specific CERCLA requirement should be applied more broadly ignores the clear language of Section 122 of CERCLA. Neither Section 122(d), dealing with consent decrees for cleanup agreements, nor Section 122(j), dealing with settlement of natural resource damage claims, includes any requirement for publication in the Federal Register prior to entry of a consent decree. This is ignored by the Non-Settling Defendants despite the fact that each of these sections provides guidance for the settlement at issue here.

Other than CERCLA Section 122(h) settlements of past costs of the United States government, the Federal Register filing notification applies only to Section 122(g), de minimis, settlements "embodied in an administrative order." 42 U.S.C. § 9622(i)(1). This requirement is specifically inapplicable to Section 122(g) settlements entered through consent decrees; this demonstrates that the notice and review process provided through filing a proposed consent decree with the Court achieves the necessary

notification and participation requirements. As such, there is no reason to delay entry of the Partial Consent Decree.

The Non-Settling Defendants have had, and taken, the opportunity to comment on the Partial Consent Decree. A full evidentiary hearing, fairness hearing or similarly laborious process is not required in order to satisfy the Non-Settling Defendants' procedural concerns. *See i.e., United States v. BP Amoco Oil*, 277 F.3d 1012, 1017-18 (8<sup>th</sup> Cir. 2002).

The Partial Consent Decree has been before this Court for almost two months. The Non-Settling Defendants have submitted their comments and objections with the Motion to Vacate. These comments and objections have been considered and responded to by the State. This Court has been given the opportunity to hear both the comments of the Non-Settling Defendants and the response of the State. The Non-Settling Defendants have been granted sufficient process to provide for due process. Any procedural requirements of CERCLA have been met in this case. Permitting the Non-Settling Defendants to delay and further complicate this case is clearly inconsistent with the purposes of CERCLA.

**B. The Partial Consent Decree is Fair, Reasonable and Consistent with the Objectives of CERCLA**

The standard for entry of a consent decree under CERCLA is not whether it pleases all parties to the litigation, but whether the settlement is "fair, reasonable, and faithful to the objectives of the governing statute." *U.S. v. Cannons Engineering Corp.*, 899 F.2d 79, 84 (1<sup>st</sup> Cir. 1990). The Partial Consent Decree is fair, reasonable and consistent with the objectives of CERCLA; it meets all standards for entry by the Court.

Strict numerical calculations of fault are not required in order to achieve fairness in a CERCLA settlement. In fact, as recognized in the *Cannons Engineering* case, “particularly in the early phases of environmental litigation, precise data relevant to determining the total extent of harm caused and the role of each PRP is often unavailable.” *Id.* at 88. The Court’s review must look to the overall fairness and reasonableness of the proposed settlement. In this case Willow Brook engaged in extended, arms length negotiations with the State and has compromised its own positions and defenses to reach agreement on the Partial Consent Decree.

CERCLA encourages early settlements and courts have recognized that goal supports discounts of claims to achieve settlement. *See U.S. v. Davis*, 11 F. Supp. 2d. 183 (D.R.I. 1998); *U.S. v. Fort James Operating Co.*, 313 F. Supp. 2d 902 (E.D. Wis. 2004). As with any settlement, litigation risk is a significant factor in determining reasonableness and fairness. *See Cannons Engineering*, 899 F.2d at 90; *U.S. v. Fort James Operating Co.*, 313 F. Supp. 2d at 908 (court noted specifically the risks and complexities of litigating natural resource damage claims). The complexity and litigation risk in this case clearly support a compromise by the State and Willow Brook to reach a settlement. The Non-Settling Defendants would surely admit to this.

The Non-Settling Defendants have themselves argued that, “[t]his case is unusually complex.” *See* Defendants’ Motion for Modification of May 14, 2009 Scheduling Order and Integrated Brief in Support, Docket 2296, p. 1. In fact, the Non-Settling Defendants have stated that this case “presents many novel and controversial legal issues,” including issues fundamental to the State’s rights to the damages it is seeking and Willow Brook is settling. *Id.*

The Non-Settling Defendants have consistently argued that the State has no recoverable damages in this case. Thus, it is hard to understand what matrix or settlement would satisfy them. The Partial Consent Decree requires a significant payment by Willow Brook, yet the Non-Settling Defendants object that it is not enough.

The mere displeasure of the Non-Settling Defendants (if they truly are displeased) with the proposed settlement is not a basis for denial of the Partial Consent Decree. It is a reasonable and fair agreement negotiated at arms' length over an extended time which represents compromise by both parties in a complex case. This type of early settlement is supported by CERCLA and is consistent with the statute's preference for early settlement.

**C. Entry of the Consent Decree Will Promote Efficiency in the Litigation Moving Forward, in Support of CERCLA's Objectives**

The Partial Consent Decree is consistent with CERCLA's objective of early settlement as it will promote efficiency in the litigation moving forward. As noted by the Non-Settling Defendants, Willow Brook is no longer in the poultry business and does not ever intend to reenter it. The Partial Consent Decree thus allows the State to settle with a defendant that has left the business and continue against the remaining parties. This simplifies the issues in the litigation moving forward in a manner consistent with CERCLA's purposes. The operational requirements of the proposed consent decree are not "illusory;" they set up strict and detailed procedures designed to ensure protection of the interests and the purposes of CERCLA should Willow Brook ever reenter the poultry business.

## **Conclusion**

In the almost two months since the Partial Consent Decree was presented to the Court, the Non-Settling Defendants have submitted comments and objections to the Court through their Motion to Vacate. The State has responded to those comments and objections. A reasonable review of that information supports entry of the Partial Consent Decree.

For all the reasons discussed above, Willow Brook respectfully requests that this Court enter final judgment under the Partial Consent Decree.

Respectfully submitted,

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